dang dan mana-mana pihak tidak berhak membuat apa-apa tuntutan terhadapnya dan terbit darinya: lihat *Nam Seng & Co* v *Wing Yew Sdn Bhd*[1] dan *Lo Su Tsoon Timber Depot* v *Southern Estate Sdn Bhd.*[2] Kesemua pihak yang terlibat di dalam penggunaan lesen itu, iaitu Bakau, EMT, NTC, plaintif dan defendan telah mendapat faedah daripadanya, di dalam suatu perkiraan yang tidak bersih. Jalan keluar bagi pihak-pihak yang terlibat bagi membetulkan kedudukan mereka ialah dengan memohon bantuan ekuiti. Tetapi, di dalam kenyataan yang dinyatakan, bagaimanakah mereka yang terlibat boleh memohon ekuiti memulihkan kedudukan mereka kepada yang asal, kerana tindakan mereka adalah bersetentang dengan prinsip ekuiti yang berkata 'sesiapa yang memohon bantuan ekuiti hendaklah datang dengan tangan yang bersih'. (Those who come to equity must come with clean hands.)

Satu perkara lagi yang penting harus dilihat di dalam kes ini. Kita perhatikan pada tahun 1979, plaintif telah menerima jumlah wang sebanyak $80,000 dari defendan yang mana, setelah ditolak jumlah bayaran cukai pendapatan, berjumlah sebanyak $71,000 sebagai harga jualan sahamnya di dalam syarikat defendan ketiga, yang telah mengambilalih EMT. Tidak ada sepatah kata pun dibuat selepasnya oleh plaintif bahawa penjualan itu telah dilakukan olehnya setelah tertipu. Bahkan, tidak ada satu lapuran pun dibuat kepada pihak polis menyatakan hal itu. Cuma, setelah empat tahun lamanya selepas hal itu baharu tindakan mahkamah ini diambil mendakwa bahawa ia telah ditipu oleh defendan supaya menjual sahamnya dan meminta supaya ia (defendan) diperintahkan membuat kira-kira. Pada pendapat saya, sikapnya menjual dan menerima saham itu, dengan tidak ada apa-apa bantahan dan mengambil masa yang begitu lama membuat tuntutannya tanpa apa-apa sebab yang munasabah, bertindak menyekat (estopped) plaintif daripada menyatakan ia telah tertipu.

Oleh itu, saya memutuskan bahawa tuntutan ini ditolak dengan bayaran kos.

Tuntutan ditolak.

Peguam: *Gill & Tang*; *Stanley Ponniah, Ng & Soo.*

Dilapurkan oleh *Prof Ahmad Ibrahim*

Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CODE NO D2-28(42)-518-88
SITI NORMA YAAKOB J
14 AUGUST 1989

Companies and Corporations — Winding up — Application to set aside winding-up petition — Judgment obtained against respondent — Failure to settle amount due on judgment — Respondent alleging that they have realizable assets — Meaning and scope of 'unable to pay its debts' — Companies Act 1965, s 218(1)(e)

Words and Phrases — 'Unable to pay its debts' — Companies Act 1965, s 218(1)(e)

The respondent applied to set aside a winding-up petition, alleging that they have realizable assets to pay the amount due to the petitioner. The petition is issued pursuant to the respondent's failure to comply with a notice issued under s 218 of the Companies Act 1965, ie failure to settle the amount due on a judgment obtained by the petitioner against the respondent.

Held, dismissing the respondent's application:

(1) The primary meaning of the phrase 'unable to pay its debts' in s 218(1)(e) of the Companies Act 1965 is insolvency in the commercial sense, ie inability to meet current demands irrespective of whether the company is possessed of assets, which, if realized, would enable it to discharge its liabilities in full.

(2) The test of the solvency of the respondent does not depend on the presence of their realizable assets.

[*Editorial Note*: The respondent has appealed to the Supreme Court vide Civil Appeal No 02-228 of 1989.]

Cases referred to

1 *Re Sunshine Securities (Pte) Ltd* [1978] 1 MLJ 57 (folld)
2 *Malayan Plant (Pte) Ltd* v *Moscow Narodny Bank Ltd* [1980] 2 MLJ 53 (folld)
3 *Re Hong Huat Realty (M) Sdn Bhd* [1987] 2 MLJ 502 (folld)
4 *Re Sanpete Builders (S) Pte* [1989] 1 MLJ 393 (folld)

Legislation referred to

Companies Act 1965 s 218(1)(e)

Francis Lim Chiew Kee for the respondent/appellant.
N Nadkarni for the petitioner/respondent.

Cur Adv Vult

Siti Norma Yaakob J: In this application to set aside a winding-up petition, the respondent had pleaded that they have realizable assets to pay the amount due to the petitioner.

The petition is issued pursuant to the respondent's failure to comply with a notice dated 16 August 1988 issued under s 218 of the Companies Act 1965. In other words, the respondent was not able to settle the amount due on a judgment obtained by the petitioner against the respondent on 2 September 1987.

The scope or the meaning to be given to the phrase 'unable to pay its debts' appearing in s 218(1)(e) of the Companies Act 1965 is explained by McPherson J in his book *The Law of Company Liquidation* (3rd Ed) at p 54 as follows:

> The phrase 'unable to pay its debts' is susceptible of two interpretations. One meaning which may properly be attached to it is that a company is unable to pay its debts if it is shown to be financially insolvent in the sense that its liabilities exceeds its assets. But to require proof of this in every case would impose upon an applicant the often near-impossible task of establishing the true financial position of the company, and the weight of authority undoubtedly supports the view that the primary meaning to the phrase is insolvency in the commercial sense — that is inability to meet current demands irrespective of whether the company is possessed of assets which, if realized, would enable it to discharge its liabilities in full.

That meaning has been accepted in the following cases (see *Re Sunshine Securities (Pte) Ltd*,[1] *Malayan Plant (Pte) Ltd* v *Moscow Narodny Bank Ltd*,[2] *Re Hong Huat Realty (M) Sdn Bhd*[3] and *Re Sanpete Builders (s) Pte Ltd*[4]).

As the test for the solvency of the respondent does not depend on the presence of their realizable assets, I had considered that the respondent had not given me any basis on which I could exercise my discretion to have the petition set aside. On that ground, I had dismissed their application and ordered that the respondent be wound up under the provisions of the Companies Act 1965, the official receiver be appointed provisional liquidator for the purpose of the said winding up and that the costs of the petition be taxed and paid to the petitioner by the liquidator out of the assets of the respondent.

Application dismissed.

Solicitors: *Lawrence & Joseph, Mahalingam & Co; Skrine & Co.*

Reported by *Zarinah Marican*

Lim Soo Seng v Majlis Perbandaran Pulau Pinang

HIGH COURT (PENANG) — CIVIL APPEAL NO 12-13-86
EDGAR JOSEPH JR J
11 AUGUST 1989

Contract — Employment — Implied term — Indemnity — Bus uninsured — Whether a servant can compel a reimbursement from the master

The appellant in this case was a bus driver employed by the respondents' predecessor-in-title. The appellant was involved in an accident wherein one Parvathy was injured. The appellant was driving the bus in the course of his employment at the material time and the bus was covered by the respondents' own insurance scheme. Parvathy sued the appellant for damages arising out of his negligent driving and judgment was entered for Parvathy with the appellant being held 50% liable. The appellant subsequently sued the respondent for reimbursement. In the court below, the learned magistrate found in favour of the respondent.

Held, allowing the appeal:
A term would be implied in the contract of service by the respondents as employers and the appellant as employee that the respondents would indemnify the appellant in cases of accident causing damage or injury to third parties arising from the negligent driving of their uninsured motor bus by the appellant.

[*Editorial Note*: The respondents have appealed to the Supreme Court vide Civil Appeal No 02-376 of 1989.]

Cases referred to
1 *Lister* v *Romford Ice and Cold Storage Co Ltd* [1957] 1 All ER 125 (not follid)
2 *Shirlaw* v *Southern Foundries (1926) Ltd* [1939] 2 KB 206 (refd)
3 *Morris* v *Ford Motor Co Ltd* [1973] QB 793 (refd)

RJ Manecksha for the appellant.
Ghazi bin Ishak for the respondents.

Cur Adv Vult

Edgar Joseph Jr J: This appeal raises a short but important point of law, namely, if through a servant's negligence in the driving of a motor vehicle in the course of his employment on the highway, a third party is injured and sues the servant alone and recovers damages, which the servant pays, may the servant in subsequent proceedings compel a reimbursement from the master? The learned magistrate who tried the case in the court below, answered this question in favour of the master, relying upon the majority judgment of the House of Lords in the case of *Lister* v *Romford Ice and Cold Storage Co Ltd*.[1] Before me, broadly and summarily stated, the question for decision is whether she was right in so holding.

The primary facts and the issue arising thereon were stated by the learned magistrate in the following terms:

> On 3 February 1974, the plaintiff then a bus driver employed by the defendants' predecessor-in-title, the Lembaga Pengu-